IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 734

STATE OF ALASKA

and

WALTER J. HICKEL, Governor of the State of Alaska, G. KENT EDWARDS, Attorney General of the State of Alaska, THOMAS J. MOORE, Commissioner of Labor of the State of Alaska, LEO A. PHILLIPS, ALFRED M. WHITE and WILLIAM JONES, members of International Union of Operating Engineers, Local 302,

Appellants,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; WILLIAM TYREE, CLARK INGRAM, JAMES O. GREEN, KENNETH E. WRIGHT, DONALD E. CONNER, ARLIN A. DECHANEY, and NATIONAL LABOR RELATIONS BOARD,

Appellees.

Appeal from the United States District Court for the District of Alaska
Consolidated Cases Nos. J-18-67 and J-19-67,
Reported in 287 F.Supp. 589 (D. Alaska, 1968)

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant presents its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Appellant, State of Alaska, presents its petition for a rehearing of the cause, and in support thereof respectfully submits that the questions in issue before this Court on appeal were too important and complex to have been disposed of by summary affirmance without an opportunity for the State of Alaska to argue its case orally. The State's argument in support of this contention is threefold and will be set out separately below.

I

THE ISSUES ON APPEAL WERE SUFFICIENTLY COMPLEX THAT SUMMARY DISPOSITION HAS LEFT THE LAW IN DOUBT.

The State's appeal raised substantial questions concerning the application of the pre-emption doctrine to situations, such as this, involving a union's unfair representation of its members' interests. *Vaca v. Sipes,* 386 U.S. 171 (1967), is strong authority for the State's position that pre-emption did not deprive the State of its right to challenge union practices which are arbitrary, discriminatory and in bad faith. As recently as *Glover v. St. Louis - San Francisco R. Co.,* 37 U.S.L.W. 4084 (U.S. Jan. 14, 1969), this Court reaffirmed its policy that a futile exhaustion of administrative remedies is not necessary where mem-

bers of a union seek court relief from union discrimination. Yet in the case at bar, the Alaskan members of Local 302 are totally without leverage to reform the union's dispatching policy (see appellant's Jurisdictional Statement at 7), and any effort spent to internally change the union would be futile. It would seem rather illogical to hold that, merely because relief from the union's discriminatory practices is being sought by the State in behalf of the complaining union members rather than directly by the union members themselves, the rationale of *Vaca* and *Glover* is inapplicable to the case at bar. Surely it is understandable that the Alaskan union members cannot afford the great expense of prosecuting to completion their own suit, as was done in *Glover,* in that the activities of Local 302 have kept the majority of them from working and earning any wages at all. It was because of the utter futility of an internal union struggle and the total financial inability of the Alaskan members of the union to fully protect their rights that the State acted through the legislature and through the courts to protect the interests of both the State and the Alaskan members of Local 302. In short the State has been acting, nearly from the first, as *parens patriae* for the union members residing in Alaska.

Where, as here, the State's interest is so great that nearly every phase of the economy is adversely affected, and where public order is threatened, the State acts both in its own behalf and in the behalf of that particular group of residents most immediately in-

jured by the discrimination: the Alaskan members of Local 302.

The district court appeared to ignore the State's position that it represents the interests of both the State and its resident union members. This position is crucial to an understanding of the State's claim that *Vaca v. Sipes, supra,* is the authority which controls this case, and that *Hill v. Florida,* 325 U.S. 538 (1945), does not apply where members sue their union on the ground of unfair representation and where exhaustion of internal remedies would be futile. The following quotation from the district court opinion underscores the State's contention that the district court did not give *Vaca* adequate consideration:

> "We find that all concerned—the public, labor, and employers, are most efficiently served by authority vested by Congress in one federal agency, empowered to reach across the entire nation and bring national consistency to the broad field of labor relations and the related complex problems arising thereunder. The result would be chaotic in the absence of such consistent policy. Certainly it is not intended that each of the hundreds of state courts of the several states be at liberty, individually, to decide these issues, national in scope and implication. Congress so empowered the National Labor Relations Board, and to that agency, for these purposes, it granted exclusive jurisdiction." (287 F.Supp. at 595.)

The State believes that this is a flawed interpretation of the law as it now stands, and fails to recognize and apply the exceptions stated in *Vaca v. Sipes.*

> The district court stated that "clearly" this Court did not intend that state courts were henceforth to have concurrent jurisdiction with the National Labor Relations Board of all unfair labor practice proceedings in which discriminatory conduct is alleged. (287 F.Supp. at 595.)

In footnote, the district court supported this conclusion by reference to *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Still in footnote, the district court acknowledged that

> *Vaca* does, however, seem to leave undecided the standard for determining when it can be fairly inferred that Congress intended exclusive jurisdiction to lie with the National Labor Relations Board. (287 F.Supp. at 595, n. 20.)

Petitioner urges that the district court failed to apply *Vaca* to the situation now in issue, and that factual similarities are such that *Vaca* is controlling authority. *Glover's* recent holding is an indication that this Court has determined that the standard of *Vaca,* referred to as "undecided" by the district court, covers the present case where futility and unfair representation are both present. By summarily affirming the district court, this Court has lent the weight of its affirmance to the district court's statement. Yet in the face of *Vaca,* that statement appears to be incorrect.

II

ADDITIONALLY, THE ISSUE OF LOCAL HIRE IS THE MOST PRESSING OF ALASKA'S LABOR PROBLEMS.

The State of Alaska has an overriding interest in reducing the unemployment among the skilled Alaskan members of Local 302. As described in detail in the appellant's Jurisdictional Statement at 6-8, the respondent union has continuously discriminated against its Alaska members by dispatching members from other states to fill Alaska job openings. This discrimination has forged a chain of economic hardship. Entangled in that heavy chain are the union's Alaska members, the employers who must hire outsiders whether or not their skills are as great as those of the Alaskans, the customer who must absorb the additional expense, and the taxpayer who supports the idled Alaskans. The nonresident workers, although they are obligated to pay state income tax on their Alaska wages, do not often invest in the State's economy. They purchase fewer consumer goods and do not usually own property taxable in Alaska. Their wages often support out of state families, and much of the money they earn leaves the State.

There is also an increasing danger of labor violence in Alaska. The seeds of this potential violence are the economic hardship and the frustration created by the union's baseless discrimination. For all its recent progress, Alaska can be physically hostile to human life, and because of the high cost of living, employment is absolutely necessary to insure the adequate food and shelter which are prerequisites to survival in such an environment.

In the face of these circumstances, the State respectfully submits that the importance of this case to Alaska and its union members requires more than summary disposition without a hearing.

III

FINALLY, BY RENDERING A SUMMARY DECISION, THIS COURT GAVE ALASKA NO GUIDELINES ON MEETING AN IMPORTANT PROBLEM.

Other states, such as Kentucky, stand in similar posture with similar situations and statutes, such as Kentucky Revised Statutes 336.170. The question will work its way through the courts again unless it is decided now.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted, and that, upon further consideration, the judgment of the District Court of Alaska be reversed.

Dated, Juneau, Alaska,
February 5, 1969.

Respectfully submitted,

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EDGAR PAUL BOYKO,
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Assistant Attorney General of the State of Alaska,
By: ROBERT L. HARTIG,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

I, Robert L. Hartig, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT L. HARTIG,
Counsel for Appellant.